No. 3771

IN THE

# United States Circuit Court of Appeals

For the Ninth Circuit

MARTHA M. JACKSON, executrix of the last will and testament of Elmer B. Jackson, deceased,

*Plaintiff in Error,*

vs.

SUNLIT FRUIT COMPANY (a corporation),

*Defendant in Error.*

## REPLY BRIEF FOR DEFENDANT IN ERROR.

BURKE CORBET,
JOHN R. SELBY,
*Attorneys for Defendant in Error.*



PERNAU-WALSH PRINTING CO., SAN FRANCISCO

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Although the reply brief on behalf of plaintiff in error adds nothing to the opening briefs, we do not think we should allow several misstatements therein to go unanswered; and we, therefore, file the following reply, in the order of the reply brief of plaintiff in error.

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### I.

In each California case cited by us, to-wit:

*City Savings Bank v. Enos,* 135 Cal. 167;
*Merriman v. Wickersham,* 141 Cal. 567,

the witness whose testimony was claimed to be inadmissible was an agent, officer and stockholder of

the corporation plaintiff in an action against an estate. In each case the express holding was that the testimony was admissible. If the testimony of such an agent is admissible, *a fortiori* is the testimony of an agent who is not a stockholder admissible. This is obvious.

As stated in our opening brief, the authorities cited by plaintiff in error are simply examples of the ordinary rule that *parties* cannot testify, and have no point in the present case.

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## II.

No reply is made to our argument based upon the rule that it is only necessary that the contract be signed by the party to be charged. In the case at bar the contract would have been enforcible against Jackson, who did sign, although entirely unsigned by the plaintiff corporation. Therefore, if the plaintiff's signature to the contract by Laney, its agent, was not properly authorized in writing, it is clear that the contract is none the less enforcible against Jackson. (See cases cited in our opening brief.)

We repeat, the cases of

*Pacific Bank v. Stone,* 121 Cal. 202;

*Blood v. La Serena Land Co.,* 113 Cal. 221,

have no application in the case at bar. Neither involves in any way the question of the enforcibility of a contract against one who has signed the contract.

## III.

Counsel for plaintiff in error seem to advance the argument that if a party makes a contract which he has not the physical ability to perform when the time for performance arrives, therefore the contract is not valid; at least that is all we can make of pages 4, 5 and 6 of their reply brief.

No reply is attempted to our argument and the opinion of the trial court, based upon the decisions of the Supreme Court of the United States and California,

> "that a contract for the sale of goods to be delivered at a future day is valid, even though the seller has not the goods nor any other means of getting them than to go into the market and buy them."

Since this is the established law, it is clearly immaterial that the wife of the maker of the contract did not sign.

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## IV.

Counsel for plaintiff in error apparently still contend that the fact that defendant was not permitted to show that the canners *voluntarily* advanced the price to growers with whom they had term contracts was prejudicial to defendant, on the theory that plaintiff *might* have so advanced the price to Jackson had he delivered the fruit. Clearly there could be no more speculative and immaterial evidence conceived of.

The Court repeatedly stated that any evidence tending to show market value would be received, and gave defendant every opportunity to present proof.

The Court found that the market value of the peaches at the time of the total breach of the contract by Jackson was $60.00 a ton (Finding XI, Trans. pp. 66-67); and also that the market value of the peaches the following year was $70.00 a ton, and the year following that $110.00 a ton. The Court allowed as damages only the difference between the contract price and $60.00 per ton, and not, as plaintiff in error states, damages to the extent of $60.00 per ton.

Further comment by us on the futility of the attempt to review in this Court the question of damages is unnecessary. (See our opening brief at pp. 27, 28, 29.) The defendant broke the contracts; the Court below found the damages on evidence which must be presumed, and was, in fact, sufficient to support its findings. That is the end of the matter, so far as this Court is concerned.

It is not true that the cases relied upon by us, and referred to in our opening brief, were cases differing from the case at bar, in that the damages were more readily ascertainable. While wholly immaterial, in the absence of any exceptions on the part of plaintiff in error, we deem it proper to say that the cases cited by us are in principle on all fours with the case at bar.

*Central Trust Co. v. Chicago Auditorium*, 240 U. S. 580;

*Roehm v. Horst,* 178 U. S. 1;
*Lompoc Produce Co. v. Browne,* 183 Pac. 166;
*Tahoe Ice Co. v. Union Ice Co.,* 109 Cal. 242;
*Hale v. Troutt,* 35 Cal. 229;
*Allen v. Field,* 130 Fed. 641,

and other cases cited.

The most effective comment we can make on the cases cited by plaintiff in error, on the question of damages, is to refer the Court to the cases themselves, so far afield are they from the point in question. To the cases cited in the opening brief counsel for plaintiff in error now add another case against a telegraph company for damages for delay in delivering a message. No authority could be less *apropos.*

Wherefore, it is respectfully submitted that the judgment should be affirmed.

Dated, San Francisco,
March 27, 1922.

BURKE CORBET,
JOHN R. SELBY,
*Attorneys for Defendant in Error.*